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No. 89-110

In The

Supreme Court of the United States

October Term, 1989

THOMAS ENGLERT, D/B/A NORTHEAST ELECTRICAL INSPECTION AGENCY,

Petitioner,

vs.

CITY OF McKEESPORT and MIDDLE DEPARTMENT INSPECTION AGENCY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT MIDDLE DEPARTMENT INSPECTION AGENCY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a violation of Section 1 or Section 2 of the Sherman Act may be founded upon a municipality's unilateral adoption of a resolution appointing an exclusive electrical inspector for the municipality and the inspector's subsequent performance of inspections in accordance with the resolution.

2. Whether a municipality's enforcement of a unilaterally-adopted resolution, under which all electrical contractors must retain the services of a designated private inspection company to the exclusion of all other inspectors, is a type of "hybrid restraint" which is proscribed by Section 1 of the Sherman Act.

3. Whether a municipality's action in unilaterally appointing a private company as the exclusive entity authorized to perform electrical inspections is exempt from antitrust scrutiny by virtue of the *Parker v. Brown* state action exemption, even though the municipality does not regulate or supervise the fees charged by the private inspector for such services.*

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*Although the above is submitted as a more appropriate statement of the third issue posed by Petitioner, as is stated subsequently in this brief, Respondent Middle Department Inspection Agency, Inc. does not concur that this issue is properly before this Court, since the issue was not addressed by either the district court or the court of appeals in granting or affirming the entry of summary judgment.

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Respondent, Middle Department Inspection Agency, Inc. (hereinafter "MDIA")[1] respectfully submits that the petition of Petitioner Thomas Englert (hereinafter "Englert") for a writ of certiorari should be denied.

[1] Pursuant to Supreme Court Rule 28.1, MDIA states that it has no parent corporations or companies and no subsidiaries or affiliates.

STATEMENT OF THE CASE

A. Counterstatement of the Facts

MDIA contends that many of the facts set forth in Englert's petition do not bear directly upon the issues presented by his petition, and this counterstatement of the facts is submitted in order to focus upon the particular facts which formed the basis for the decisions of the district court and the court of appeals.

Englert's petition seeks review of the judgment of the United States Court of Appeals for the Third Circuit affirming the entry of summary judgment for defendants on Englert's antitrust claims against MDIA and the City of McKeesport under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Englert, who operates an electrical inspection company, based his antitrust claims upon a resolution adopted by the City of McKeesport on May 5, 1982 appointing MDIA as the exclusive electrical inspector for McKeesport. Both the district court and the court of appeals concluded that summary judgment was appropriate because Englert was unable to come forward with evidence that MDIA had conspired with McKeesport or had engaged in the willful acquisition of monopoly.

It is clear that the record at the time of summary judgment contained no facts tending to show that MDIA conspired with McKeesport or participated in any way in the enactment of the May 5, 1982 resolution. This does not now appear to be disputed by Englert. Indeed, the court of appeals in its opinion specifically noted:

> At oral argument before this court Englert's attorney conceded that he could not prove that

> the passage of the May 5, 1982 resolution was the result of concerted action.[9]
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> ---
>
> [9] Previously, Englert had conceded as much in his brief: "there is little evidence which would support an inference that defendant MDIA induced the passage of the May 5, 1982 resolution or otherwise participated in the deliberations of McKeesport concerning that resolution."

(Opinion of Court of Appeals, Appendix A to Petition, p. A-13).

Even apart from this concession, the record upon which summary judgment was based established that there was no genuine factual issue on this point. Englert's amended complaint did not allege that MDIA played any part in McKeesport's decision to adopt the May 5, 1982 resolution. Englert's pretrial statement, which under local rules was required to contain a "narrative statement of the material facts a party will offer at trial," did not propose to introduce a single fact to establish that MDIA had any involvement in the enactment of the resolution. MDIA's involvement in McKeesport's decision to enact the resolution was denied in the affidavit of Louis Washowich, Mayor of the City of McKeesport. In their depositions, both James Heinsberg, Manager of MDIA, and Robert Shaffer, Assistant Regional Manager of MDIA, stated that, to their knowledge, neither they nor MDIA were involved in any discussions with representatives of McKeesport concerning the ordinance that it enacted relating to electrical inspection.

Indeed, in his brief to the district court, Englert advanced only five factual contentions as evidence of any

"contract, combination or conspiracy" or "willful acquisition of monopoly" for purposes of his Sherman Act claims. As recited by the court of appeals, citing the opinion of the district court, these contentions were:

> . . . that (1) MDIA provided information to McKeesport before the ordinance was passed; (2) a representative of MDIA attended the council meeting at which the ordinance was passed; (3) this representative sat with the city's electrician during this meeting; (4) the city advised contractors of the need to hire MDIA under the new ordinance; and, (5) MDIA accepted and performed all work requested of it.

(Opinion of Court of Appeals, Appendix A to Petition, p. A-14).

It appears that, as was the case in the courts below, Englert does not now base his claims upon any asserted conspiracy leading to the enactment of the resolution. Rather, he now asserts that the parties' conduct subsequent to the enactment of the resolution was sufficient to establish his Sherman Act claims. Since Englert alleges no participation by MDIA in McKeesport's informing contractors of the resolution, his petition to this Court focuses narrowly upon whether MDIA's performance of inspections after the resolution is alone sufficient to establish MDIA's participation in a conspiracy or its willful acquisition of monopoly for purposes of his Sherman Act claims.

Since the decision from which Englert seeks review was based upon the absence of facts sufficient to establish the critical elements of conspiracy and willful acquisition of monopoly, many of Englert's factual assertions, such as

those concerning his qualifications as an electrical inspector (Petition, p. 5), the formation of his electrical inspection business (Petition, pp. 5-6), whether McKeesport exercises control over rates charged by MDIA for inspection work (Petition, p. 7), and the curtailment of Englert's ability to perform electrical inspection work in McKeesport (Petition, p. 7), are not believed by MDIA to be central to the issues submitted to this Court for review.

B. Proceedings Below

MDIA does not take substantial issue with Englert's recitation of the procedural history of this case, although MDIA does not necessarily adopt any characterization of, or commentary on the decisions below. The opinions of the district court and the court of appeals are set forth in full in Appendices to the Petition and speak for themselves.

MDIA does not concur, however, that the issues raised in the initial motions to dismiss and the first appeal to the court of appeals are germane to the issues now raised in Englert's petition for certiorari.

Furthermore, although the district court did entertain motions for judgment on the pleadings on issues of state action immunity under the principles of *Parker v. Brown* or immunity under the *Noerr-Pennington* doctrine, those preliminary motions and the district court's decisions thereon were not the subject of Englert's appeal to the court of appeals.

While MDIA did include, as alternative grounds for its summary judgment motion, arguments based upon

state action immunity and the *Noerr-Pennington* doctrine, the district court, in entering summary judgment, relied entirely upon the inability of Englert to produce sufficient evidence of concerted activity or willful conduct by MDIA to sustain his antitrust claims (November 3, 1988 Opinion of the District Court, Petition, Appendix B, p. B-3) and did not address the state action or *Noerr-Pennington* issues at all. The court of appeals likewise found it unnecessary to address these issues, stating:

> Inasmuch as we find that the district court correctly concluded that Englert was unable to demonstrate the concerted action element of his claims we need not address the affirmative defenses raised in the district court.

(Opinion of the Court of Appeals, Petition, Appendix A, p. A-11). Consequently, MDIA does not concur with any implication in Englert's petition that the decision of the court of appeals presents any issue concerning state action immunity upon which this Court may appropriately grant review.

SUMMARY OF ARGUMENT

Both the record below and Englert's concessions establish that Englert was unable to prove that the May 5, 1982 resolution was enacted as the result of any concerted action between MDIA and McKeesport. Therefore, the court of appeals correctly determined that there was neither concerted action nor willful acquisition of monopoly power by MDIA sufficient to establish Englert's Sherman Act claims.

Moreover, the fact that MDIA performed electrical inspections in McKeesport after enactment of the resolution is insufficient as a matter of law to establish any contract, combination, or conspiracy between MDIA and McKeesport.

The court of appeals correctly distinguished the "hybrid restraint" cases cited in *Fisher v. City of Berkeley*, 475 U.S. 260 (1986) on the grounds that such cases are inapplicable where no combination of private parties is involved and the only alleged combination is between a governmental entity and a single private actor.

A writ of certiorari is inappropriate with respect to issues relating to state action immunity, where neither the district court nor the court of appeals addressed the issue at all, and where such issues are not applicable in the absence of a *prima facie* case establishing the elements of a Sherman Act claim.

ARGUMENT

A. The Decision of the Court of Appeals is Fully Consistent with Established Federal Antitrust Law Including this Court's Decision in *Fisher v. City of Berkeley*.

Englert's petition presents no substantial issue of federal law which would warrant the issuance of a writ of certiorari by this Court.

Instead, the decisions of both the district court and the court of appeals were simply correct applications of traditional and well-established principles of antitrust

law holding that (1) unilateral action is not a violation of Section 1 of the Sherman Act, and (2) a monopolization claim under Section 2 of the Sherman Act requires proof of willful acquisition of monopoly power.

It is fundamental that a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, requires proof of a "contract, combination or conspiracy" in restraint of trade or commerce. Unilateral action, no matter what its motivation or effect, is not violative of this section. Both the district court and the court of appeals correctly cited and applied the opinion of this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), which stated:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

465 U.S. at 764, quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

The court of appeals was likewise following well-established principles of antitrust law when it held that a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, required proof that MDIA had "willfully acquired" monopoly power. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 (3d Cir. 1978), *cert. denied*, 439 U.S. 838 (1978).

It is clear therefore that McKeesport's unilateral enactment of the May 5, 1982 resolution simply cannot be the basis of antitrust liability of MDIA or McKeesport under Section 1 or 2 of the Sherman Act. Englert asserts that the decision of the court of appeals has "far-reaching effects with respect to municipal regulation" (Petition, p. 13), and argues that "the Third Circuit has ruled that a municipality may impose virtually any restriction or restraint upon competition, so long as that restraint is imposed unilaterally." (Petition, p. 13). The Third Circuit has clearly done no such thing. The issue presented to the court of appeals, and to this Court, is not some broad, hypothetical proposition concerning the limits of municipal authority. The issue there, and here, is what action is violative of *the Sherman Act*. Section 1 of the Sherman Act does not prohibit unilateral conduct, but requires proof of a "contract, combination or conspiracy." Section 2 of the Sherman Act requires proof of willful acquisition of monopoly power. In a case such as this, where the alleged harm to the plaintiff is alleged to have arisen from the enactment of the May 5, 1982 resolution, Englert's inability to establish MDIA's involvement in the resolution's enactment was properly found by the court of appeals to preclude liability of defendants under the Sherman Act.

Englert seeks to avoid his inability to find a conspiracy in the enactment of the May 5, 1982 resolution by arguing that the requisite elements of conspiracy or willful acquisition of monopoly can be inferred from events which occurred *after* the resolution was adopted by McKeesport. The court of appeals correctly and summarily disposed of Englert's contention that McKeesport's alleged actions in notifying contractors of

the ordinance supplied the necessary element of conspiracy, noting, "Englert does not refer to any instance in which MDIA participated in this activity." (Opinion of the Court of Appeals, Petition, Appendix A, p. A-17). This leaves the mere performance of electrical inspection services as the only alleged action by MDIA asserted by Englert as the basis for his Sherman Act claims.

Englert's reliance upon actions occurring after the enactment of the resolution smacks of bootstrapping and circularity. The enactment of the May 5, 1982 resolution is clearly the event which lies at the center of Englert's claims. Any harm to Englert resulted from the resolution itself and not from any subsequent activity by MDIA in performing electrical inspections. Since the resolution was enacted unilaterally by McKeesport, it is inconceivable how the mere performance of electrical inspections can in any way be considered part of a "common scheme designed to achieve an unlawful objective."

Englert's argument appears to assume that MDIA had some affirmative duty to refuse to perform electrical inspections after the resolution was enacted, even though it did not participate in its enactment. However, Englert cites no authority for the extraordinary proposition that a party is required to decline work under these circumstances, and no such authority exists.

This is clearly not a case where conspiracy is established by evidence of "tacit agreement" or "acquiescence," as Englert suggests. The cases which he cites, dealing with civil or criminal conspiracy in a context other than antitrust law, do no more than state the well-recognized principle that a conspiracy may be proved by

circumstantial evidence. But both of the cited cases turned upon the existence of substantial evidence permitting an inference that a defendant was a part of an ongoing conspiracy. In *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), for example, the live-in companion of a man who committed murder during a burglary was properly held civilly liable as a co-conspirator, given substantial evidence of defendant's acts over a number of years tending to show her knowing participation in and assistance to an illegal enterprise to acquire stolen property. Likewise, in *United States v. Alemeny Rivera*, 781 F.2d 229 (1st Cir. 1985) the court held that there was substantial evidence to create an inference of the defendant's participation in a conspiracy to defraud the United States Government, notwithstanding contrary testimony by the alleged co-conspirator. These cases provide no support for Englert's position in this case, where the alleged harm occurred *before* any conduct by MDIA, by reason of a resolution enacted without MDIA's participation, and where MDIA's conduct in performing inspections cannot be said to contribute in any way to the continued existence of the resolution and is perfectly consistent with innocent conduct by MDIA.

This Court has specifically held that conduct which is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968); *Monsanto, supra* at 764; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). In *Matsushita, supra*, this Court stated:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

475 U.S. at 588.

The court of appeals did not break any new legal ground in rejecting Englert's argument that the mere performance of electrical inspections by MDIA after the resolution was adopted established the existence of a conspiracy between MDIA and McKeesport. Rather, its decision is perfectly in accord with the rule that conduct equally consistent with independent action cannot give rise to an inference of conspiracy. This is highlighted by the court's recognition that there was no practical alternative to MDIA's performance of services: "[W]e cannot understand how MDIA could have avoided the appointment except by refusing business." (Opinion of Court of Appeals, Petition, Appendix A, p. A-16).

The decision of the court of appeals is in no way in conflict with the opinion of this Court in *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), and the cases cited therein, concerning "hybrid restraints."

It must be noted, at the outset, that *Fisher* itself refutes Englert's contention that the May 5, 1982 resolution should be viewed as a "group boycott of all inspection companies other than MDIA by all electrical contractors performing work in McKeesport." (Petition, p. 16). *Fisher* was an action by certain landlords challenging the constitutionality of a city's rent control ordinance. This Court rejected the argument that the action was pre-

empted by the Sherman Act, holding that the rent ceilings at issue were imposed unilaterally by the city and were therefore not in violation of Section 1 of the Sherman Act. Significantly, this Court specifically rejected the argument that the city's rent ceilings created a conspiracy between the city and affected landlords. In this regard, this Court stated:

> A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law.

475 U.S. at 267. Thus, *Fisher* effectively disposes of Englert's attempt to characterize unilateral action as a "group boycott" by arguing that electrical contractors must obey the resolution. The two "group boycott" cases which Englert cites, *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), involve purely private refusals to deal, with no involvement by any municipality or other governmental body. Consequently, they provide no support for Englert's contention.

As to whether the resolution in this case constituted a "hybrid restraint" within the meaning of Justice Marshall's discussion of such restraints in *Fisher*, the court of appeals correctly distinguished the "hybrid restraint" cases as involving "groups of individuals engaged in concerted activity in which a government actor also joined." (Opinion of the Court of Appeals, Petition, Appendix A, p. A-17). It is clear that such cases involve situations in which governmental action is invoked to legitimize private conduct which would otherwise be an

unlawful conspiracy or wrongful conduct. For example, in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), at issue was a Louisiana statute which authorized a distributor to enforce agreements fixing minimum retail prices against retailers who were not parties to the contract. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the challenged conduct involved a state requirement which essentially permitted price fixing among private wine producers. *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), presented a challenge to the legality of California statutes prohibiting a licensed importer of alcoholic beverages from purchasing or accepting delivery of distilled spirits unless designated as an authorized importer by the brand owner or his agent. In each of these cases, the challenged conduct involved concerted action by two or more private parties, apart from the government, under circumstances where the private conduct would have been considered concerted action violative of the Sherman Act in the absence of governmental regulation. Under such circumstances, the "hybrid restraint" cases simply provide that state involvement will not legitimize conduct which would otherwise violate the antitrust laws. As this Court stated in *Midcal, supra*:

> The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement *over what is essentially a private price-fixing arrangement.*

445 U.S. at 106 (Emphasis added). Thus, the court of appeals was correct in holding the "hybrid restraint" cases to be inapplicable to the present case, in which the only alleged concerted action was between MDIA and the

municipality itself, and no conspiracy of private parties was involved.

Englert seeks to challenge this conclusion by arguing that "the Court of Appeals totally ignored the involvement of the electrical contractors, who are required to boycott Englert and hire MDIA in order to comply with McKeesport's resolution." (Petition, p. 15). However, as is noted above, this Court specifically addressed, and rejected, such a contention in *Fisher*.

Clearly, the decision of the court of appeals was fully in accordance with established principles of antitrust law, and presents no substantial issue of federal law which would warrant the issuance of a writ of certiorari.

B. The Question of Immunity under *Parker v. Brown* State Action Immunity is Not a Proper Subject for Review by This Court Where Neither the District Court Nor the Court of Appeals Addressed This Issue in Granting and Affirming the Entry of Summary Judgment.

It is particularly inappropriate for Englert to seek review by writ of certiorari of issues relating to state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. As is noted in the Statement of the Case, *supra*, both the district court and the court of appeals concluded that summary judgment was proper because Englert could not make out the elements of a cause of action under Section 1 and Section 2 of the Sherman Act. Thus, although affirmative defenses based upon state action immunity were presented as alternative arguments in support of MDIA's motion for summary judgment, the courts below found it unnecessary to rule

upon them, and their opinions do not address the issues of state action immunity at all.

Consequently, it cannot be said that the decision of the court of appeals presents any issue whatsoever with respect to state action immunity. Since the issue was not addressed, there is nothing for this Court to review by writ of certiorari.[2] Indeed, this Court has stated that it will ordinarily not consider an issue without a lower court opinion. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Englert seriously confuses the distinction between the elements of a Sherman Act violation and the requirements of state action immunity as an *affirmative defense*, in his recitation of state action immunity cases such as *Midcal, supra, Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984), *cert. denied*, 472 U.S. 1028 (1985), and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985). His continuing references to the requirement of "active state supervision" over the activities of a municipality ignore the fact that such issues are not relevant at all where a Sherman Act violation

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[2] This is not to say that the issue of state action immunity would not provide an alternative ground for affirmance of the decision of the court of appeals, and MDIA does not waive any arguments which it may have in that regard. However, where the issue is whether this Court should issue a writ of certiorari, the fact that state action immunity was not discussed by the court of appeals establishes that there is no substantial issue of federal law to justify the issuance of the writ. *See*, Supreme Court Rule 17.

cannot be established in the first instance, and where state action immunity defenses need never be reached.

Each of the cases cited above involved a factual situation in which a governmental entity was alleged to have conspired with private parties, *see, Independent Taxicab, supra,* (exclusive concession established by contract between a city and a private taxicab operator); *Tom Hudson, supra,* (exclusive trash collection contract between a city and a private trash collection company); to have enacted a statute permitting anticompetitive combinations by private parties, *see, Midcal, supra;* or to have engaged in monopolization on its own, rendering unnecessary any finding of conspiracy with other parties, *Hallie, supra* (alleged monopolization by city in provision of waste treatment services).

The court of appeals did not act inconsistently with any of the above decisions in affirming the entry of summary judgment in this case. Whereas the above cases clearly presented the elements of monopolization or concerted action making necessary an inquiry into the defense of state action immunity, this case does not. In effect, Englert is attempting to assert state action immunity issues as if they were relevant to his initial burden of establishing a *prima facie* claim under the Sherman Act.

Because the issues of state action immunity were not addressed by the district court or the court of appeals, and because such issues are not relevant to the elements of the Sherman Act claims upon which the court of appeals based its decision, it is clearly inappropriate for this Court to issue a writ of certiorari on any issues pertaining to state action immunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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